

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEROY M. STEPHEN
Claimant

VS.

PHILLIPS COUNTY
Respondent

AND

**KANSAS WORKERS RISK COOPERATIVE
FOR COUNTIES**
Insurance Carrier

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Docket No. 1,021,316

ORDER

Claimant appeals the March 14, 2006 Award of Administrative Law Judge Bruce E. Moore. Claimant was awarded benefits for a 5 percent permanent partial disability based on his functional impairment, but denied a permanent partial work disability. The Administrative Law Judge (ALJ), after determining that claimant's injuries played no role in claimant's failed re-election bid as sheriff of Phillips County, Kansas, found no nexus between claimant's loss of employment and his injury. The Appeals Board (Board) heard oral argument on June 21, 2006.

APPEARANCES

Claimant appeared by his attorney, Jeffrey E. King of Salina, Kansas. Respondent and its insurance carrier appeared by their attorney, Mickey W. Mosier of Salina, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, the parties stipulated at oral argument before the Board that claimant has a 5 percent permanent partial impairment of function of the whole body based upon the opinion of Mirza S. Baig, M.D. The parties further agreed that if claimant is entitled to a permanent partial work disability, claimant has suffered a 46 percent loss of task performing abilities. The parties further agreed that claimant has suffered a 100 percent loss of wage earning ability if the Board finds that claimant has put forth a good faith effort to retain or obtain employment after his accident,

and claimant has a 63.5 percent loss of wage earning capacity if the Board finds a wage should be imputed because claimant has not put forth a good faith effort to retain or obtain employment after his accident.

ISSUES

1. Is claimant entitled to temporary total disability for the period from January 10, 2005, through April 20, 2005?
2. What is the nature and extent of claimant's disability? And more particularly, did claimant put forth a good faith effort to find employment after his work-related accident? Additionally, is claimant precluded from a permanent partial general disability after losing his bid for re-election to the position of sheriff of Phillips County, Kansas, for failing to prove a nexus between his loss of employment and his injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be modified to award claimant a permanent partial general disability of 54.75 percent.

Claimant has been sheriff of Phillips County for a total of about 25 years. His first period as sheriff lasted 12 and a half years. Claimant then left and worked for a different employer for 3 years. He then sought re-election and was Sheriff for 12 years, leading up to his work-related injury on May 25, 2004. On that date, claimant and a deputy were trying to handcuff an unruly prisoner when they lost their balance and fell to the floor. The deputy and the prisoner fell on top of claimant, and claimant's right leg and back were injured. Claimant developed a hematoma in his right leg, which has since resolved. But claimant also began noticing problems with his back.

Claimant ultimately came under the care of board certified orthopedic surgeon Mirza S. Baig, M.D. Dr. Baig first examined claimant on July 16, 2004. At that time, Dr. Baig diagnosed myofascial pain syndrome, mechanical low back pain and lumbar spondylosis. Claimant underwent three trigger point injections for the myofascial pain syndrome. Dr. Baig found preexisting arthritis and lumbar spondylosis. He opined the myofascial pain syndrome and back tightness were related to the work-related injury, while the spondylosis was aggravated by the accident.

Claimant was returned to work with a lifting restriction of 10 pounds and prohibited from stooping, bending or twisting. Claimant was off work for approximately two months, during which time the county continued to pay his salary. He then returned to work on light duty. He was able to follow the light-duty restrictions by delegating duties to others in the department. Claimant mainly did office work during this time.

Claimant was up for re-election in November of 2004, but was unable to campaign during the primary. He lost the primary election in August 2004, but organized a write-in campaign. However, he lost the general election in November and his last day in office was January 10, 2005. Claimant alleged that his opponent used his work-related injury against him in the campaign, but verification of this allegation was not in the record.

Claimant was able to work as sheriff while under Dr. Baig's restrictions. On October 13, 2004, Dr. Baig modified the restrictions to a 30-pound lifting restriction with no bending and twisting. Again, claimant was able to work within these restrictions by assigning duties to other members of the department. This self-accommodation continued through claimant's employment term with respondent. Claimant was found to be at maximum medical improvement (MMI) and released by Dr. Baig on April 20, 2005, at which time the 30-pound restriction was made permanent. Claimant was also told to avoid stooping, bending and twisting. Claimant's last visit with Dr. Baig was on June 17, 2005, with the restrictions remaining the same. Dr. Baig rated claimant at a 5 percent permanent partial impairment of function of the whole body, with the rating being based on the fourth edition of the *AMA Guides*.¹ Dr. Baig's impairment opinion is the only one in the record, and as noted above, is adopted by the Board for the purposes of this award.

Claimant did not seek employment from the time of his job loss on January 10 until his release by Dr. Baig on April 20, 2005. Claimant testified that he was unable to look for employment during this time. However, claimant's restrictions during this time were the same as those placed upon him by Dr. Baig on October 13, 2004. These restrictions were also almost identical to the permanent restrictions placed on claimant when Dr. Baig released him at MMI in April 2005.

After his April 20, 2005 release, claimant began seeking employment. He testified as to the places he looked for work. However, at the time of the regular hearing on October 12, 2005, claimant had submitted only one application with a prospective employer, that being for a deputy sheriff position. The Board does not find this to be a good faith effort by claimant.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁵

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.⁶

The parties have stipulated to the fact that claimant suffered an accident arising out of and in the course of his employment, and to the 5 percent functional impairment associated with that injury. Additionally, the parties stipulated to the 46 percent task loss suffered by claimant from that accident.

As noted above, K.S.A. 44-510e requires that both the task loss and wage loss be averaged before a "work disability" can be computed.

² K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 44-501(a).

⁵ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁶ K.S.A. 44-510e(a).

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*⁷ and *Copeland*.⁸ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁹

Here, the ALJ found claimant to not be entitled to a work disability as there was no nexus between his job loss and his work injury, citing *Hernandez*.¹⁰ The ALJ held that but for claimant's failed re-election bid, he would still be earning comparable wages. In *Hernandez*, the claimant suffered a work-related injury. He was then returned to work with restrictions, but continued receiving the same hourly rate of pay as before the injury.

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.¹¹

The claimant in *Hernandez* was reduced to an average weekly wage below that which he was earning before the accident due to a plant-wide reduction in overtime. The Court of Appeals, in affirming the Board's denial of a work disability to Hernandez, quoted the Board's opinion, finding "[t]his unique factual situation warrants a finding that [Hernandez] has not sustained a wage loss because the wage reduction is based upon

⁷ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁸ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁹ *Id.* at 320.

¹⁰ *Hernandez v. Monfort, Inc.*, 30 Kan. App. 2d 309, 41 P.3d 886 (2002).

¹¹ K.S.A. 44-510e.

economic factors affecting all of [Monfort's] employees and not just [Hernandez]."¹² Additionally, the Court of Appeals distinguished its earlier decision in *Lee*.¹³

In *Lee*, the claimant was injured, returned to work, and worked with restrictions until he lost his job due to a plant layoff. Before the layoff, Lee was working at a wage comparable to that which he had earned before the accident. The court was asked for the first time to determine whether the version of K.S.A. 44-510e then in effect, which created a presumption of no work disability if the employee engages in work for wages comparable to the average weekly wage that the employee was earning at the time of the injury, could apply to one period of time and be overcome as to another. The court found that such an application was proper. The *Lee* court also considered the 1993 amendments to K.S.A. 44-510e which apply to this matter. The court found that Lee may even qualify for a work disability under the new law if he stopped earning a comparable wage, subject to his ability to prove it.

The Board finds this case more like *Lee* than *Hernandez*. Both this claimant and Lee were returned to work at a comparable wage, working under restrictions which were accommodated. Both lost their jobs, one to a layoff and one to a lost election. Under both versions of the law, the claimant would be denied a work disability during the time he worked, earning either a comparable wage as in *Lee* or wages equal to 90 percent or more of claimant's average weekly wage as here.

The court in *Lee* stated :

It is not the intent of the legislature to deprive an employee of work disability benefits after a high-paying employer discharges him or her as part of an economic layoff where the employer was accommodating the injured employee at a higher wage than the employee could earn elsewhere.¹⁴

The logic of the *Lee* court applies here as well. This claimant earned a higher wage than he could earn away from the sheriff's position due to his ability to self-accommodate. The Board, therefore, finds that the Award of the ALJ should be modified to award claimant a 5 percent permanent partial disability based on his functional impairment through claimant's last day of January 10, 2005, to be followed by a 54.75 percent permanent partial general disability after averaging the 46 percent stipulated task loss with the 63.5 percent stipulated wage loss.

¹² *Hernandez* at 311.

¹³ *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

¹⁴ *Id.* at 372.

After the April 20, 2005 release by Dr. Baig, claimant put forth very little effort to obtain employment. His efforts involved the submission of only one application in the six months between his release and the regular hearing. This effort on claimant's part is inadequate. The Board finds claimant did not put forth a good faith effort to obtain employment and the work disability under K.S.A. 44-510e as interpreted by *Foulk*¹⁵ requires that the fact-finder impute an appropriate post-injury wage.

With regards to claimant's request for temporary total disability benefits for the period from January 10, 2005, through April 20, 2005, the Board affirms the ALJ's denial of benefits. Claimant was working under the same restrictions during that time frame as were in effect at the time he left office and as were in effect in October 2004, when he was being treated by Dr. Baig, and during his job search. Claimant provided no proof that he was temporarily totally disabled during that period following the end of his term as sheriff.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated March 14, 2006, should be, and is hereby, modified to award claimant a 5 percent permanent partial disability based upon his functional impairment through January 10, 2005, to be followed by a 54.75 percent permanent partial general disability beginning January 11, 2005.

Claimant is granted an award against the respondent, Phillips County, and its insurance carrier, Kansas Workers Risk Cooperative For Counties, for an accidental injury which occurred on May 25, 2004, and based upon an average weekly wage of \$655.09 through January 10, 2005, and \$739.63 after January 10, 2005. Claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of \$436.75 per week or \$9,062.56 for a 5 percent permanent partial disability, followed by 206.46 weeks of permanent partial general disability compensation beginning January 11, 2005, at the rate of \$440.00 per week totaling \$90,842.40 for a 54.75 percent permanent partial disability, making a total award of \$99,904.96.

As of July 26, 2006, there would be due and owing to the claimant 20.75 weeks of permanent partial disability compensation at the rate of \$436.75 per week in the sum of \$9,062.56, followed by 80.28 weeks of permanent partial disability compensation at the rate of \$440.00 per week in the sum of \$35,323.20, for a total due and owing of \$44,385.76, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the

¹⁵ *Foulk, supra.*

remaining balance in the amount of \$55,519.20 shall be paid at the rate of \$440.00 per week for 126.18 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffrey E. King, Attorney for Claimant
 Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier